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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/767,355	01/23/2001	Stephen Philip Mann	GJE-13XC1D1C1	3294
23557	7590	07/02/2003		LG
SALIWANCHIK LLOYD & SALIWANCHIK A PROFESSIONAL ASSOCIATION 2421 N.W. 41ST STREET SUITE A-1 GAINESVILLE, FL 326066669			EXAMINER	
			HENDRICKS, KEITH D	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 07/02/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/767,355	MANN, STEPHEN PHILIP
	<b>Examiner</b>	<b>Art Unit</b>
	Keith Hendricks	1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) Responsive to communication(s) filed on 09 April 2003.
- 2a) This action is **FINAL**.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) Claim(s) 1-3 and 6-48 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-3,6-18 and 22-48 is/are rejected.
- 7) Claim(s) 19-21 is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.
 

If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All
  - b) Some \*
  - c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
  - a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____	6) <input type="checkbox"/> Other: _____

## DETAILED ACTION

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 23, 34 and 41 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 23, 34 and 41, the term “byproducts” is indefinite. It is unclear from what starting material(s) or types of starting material(s), the component “byproducts” are derived, and/or how they are derived. The metes and bounds of the claimed invention are indefinite, given that it is unclear as to what is encompassed by the phrase. While subsequent claims provide more specific examples of types of “byproducts”, it remains unclear as to what is encompassed by the broad term. For example, byproducts of metabolic pathways, or even industrial byproducts such as smoke, are potentially encompassed, but it is unclear if this is included in what “applicant regards as his invention,” and if so, how these may be obtained and utilized.

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

i) Claims 41 and 43-44 are rejected under 35 U.S.C. 102(b) as being anticipated by Lewandowski et al.

The reference and rejection are incorporated as cited at page 3 of the Office action mailed 12/21/01. Further, Lewandowski et al. disclose that *Lactobacillus kefir* is present in the composition being pretreated in amounts of  $1.730 \times 10^9$  units per ml (col. 14, lines 15-21). Claim 19 of the reference specifically states that the resultant “edible biomass for animal feed” is a “solid biomass”.

Applicant's arguments filed 4-9-03 have been fully considered but they are not persuasive.

It is noted that in instant claim 41, the term “byproducts” includes the milk effluent byproduct disclosed by the reference. With regard to applicant’s suggestion that the bacteria are removed with the liquid and are not present in the separated biomass, or at least are present in amounts lower than those currently claimed, reference is made to columns 5-6, as well as claim 3, of the reference, which state that part of the biomass is recycled back into the effluent. This is because a portion of the microorganisms – present in the biomass – are used again as starter cultures for the next cycle. “They form a stable microorganism population, in fact, once the population has been adjusted to the specificity of the effluent to be treated, no drift has been observed after five years of operation” (top col. 5).

Thus, the instant claims are anticipated by the reference.

ii) Claims 1-3, 8-18, 22, 41-42, 45 and 48 are rejected under 35 U.S.C. 102(b) as being anticipated by Cooke (Agricultural Research, 1995, of record). The reference and rejection are taken as cited in a previous Office action.

Applicant's arguments filed 4-9-03 have been fully considered but they are not persuasive. At page 7 of the response, applicant states that the reference does not make clear that the cited bacteria are necessarily present, and state that simply because such “may occur or be present is not sufficient to establish the inherency of that result or characteristic.” While this latter statement is not argued, applicant’s position is not deemed persuasive. The reference clearly states that the bacteria was present in the silage; “he isolated a strain of *Lactobacillus buchneri* from one of these [spoilage] resistant silages” (col. 2). This is a positive recitation, and is not speculative or subject to doubt. What would be an inherent *property* of that total composition of matter and the described method of feeding such to animals, is the increased feed efficiency in the animals consuming the product. Since the same starting materials and methods were utilized, one of ordinary skill in the art would necessarily expect the same or extremely similar results.

iii) Claims 45-47 are rejected under 35 U.S.C. 102(b) as being anticipated by Alifimtsev et al. (SU 1777772, 1992, of record). The reference and rejection are taken as cited in a previous Office action.

Applicant's arguments filed 4-9-03 have been fully considered but they are not persuasive. At page 8 of the response, applicant states that “the reference fails to teach multiple feedings.” However, new claims 45-47 are directed to a method of making the animal food, and not to a method of using such. Thus, the rejection stands for the reasons of record, now as applied to new claims 45-47.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-3, 6-18, 22 and 23-48 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-40 of U.S. Patent No. 6,326,037. Although the conflicting claims are not identical, they are not patentably distinct from each other because the patented claims are generally directed to a method for treating silage (grass, maize, crop cereals) with *Lactobacillus buchneri*, while the instant claims are directed to a feed composition, containing a feed material made of grasses, corn, crop cereals, etc. (claims 12 & 18), and a *Lactobacillus* bacteria including *Lactobacillus buchneri*. The treatment of the silage thus yields a composition of the same material, which is traditionally used in various food methods, including administration to animals.

### ***Conclusion***

Claims 19-21 are free of the prior art of record. These claims are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. There is no teaching or suggestion in the art to utilize either of strains *Lactobacillus parabuchneri* or *L. parakefir* within solid animal feedstuffs, as claimed. Further, there does not appear to be any evidence or teaching that such a feedstuff existed prior to the effective filing date of the instant application.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.



KEITH HENDRICKS  
PRIMARY EXAMINER